U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: SEP 0 4 2013 Office: TEXAS SERVICE CENTER File: [redacted]

IN RE: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software design consulting company. It seeks to employ the beneficiary permanently in the United States as a websphere administrator. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petition was not accompanied by a labor certification for the areas of intended employment, in that the petition did not specify multiple alternate worksites. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 8, 2013 denial, the issue in this case is whether or not the job offered on the labor certification was *bona fide* as the petitioner did not demonstrate that the position involved living and working in the same Standard Metropolitan Statistical Area (SMSA) as listed on the labor certification application. In addition, the information in the record indicates that the petitioning business is not active and in good standing with the State of New Jersey, rendering the appeal moot.

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(1).

As a threshold issue, the AAO sent a Notice of Intent to Dismiss and Request for Evidence (NOID/RFE) dated June 28, 2013 noting that the New Jersey Business Gateway Services stated that the petitioner's status was not active in the state. The NOID/RFE advised the petitioner that if its organization is no longer in business, then no *bona fide* job offer exists, and the petition and appeal would therefore be moot. Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of the petitioner's business. *See* 8 C.F.R. § 205.1(a)(iii)(D). Moreover, the NOID/RFE advised that any concealment of the true status of your organization seriously compromises the credibility of the remaining evidence in the record and that independent, objective evidence would need to be submitted to resolve any inconsistencies in the record. *See Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988).

In response to the NOID/RFE, counsel stated that the petitioner was in good standing in the State of New Jersey and stated that a certificate of good standing was being submitted. The only Certificate of Good Standing submitted was for the State of Connecticut. No evidence was submitted to demonstrate that the petitioner is an active entity in the State of New Jersey, which is the location of the proposed employment. As a result, the petition and appeal are moot and the appeal is denied on this basis.

Concerning the area of employment, the regulation at 20 C.F.R. § 656.30(c)(2) provides:

> A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.

The labor certification states that the petitioner's location is in and that the "primary worksite (where work is to be performed)" is the petitioner's location in The Form I-140 indicates that the beneficiary lives in a location calculated by the director to be 215 miles away from the petitioner's location.

The director sent a Notice of Intent to Deny (NOID) on November 27, 2012[1] noting that the labor certification indicates an address for the place of employment in New Jersey while Internal Revenue Service (IRS) Forms W-2 for 2008, 2009, and 2010 issued by the petitioner indicate that the beneficiary lived in and pay stubs indicate that the beneficiary moved to in December 2010. As a result of the beneficiary's residence being so far from the petitioner's location, the director requested evidence "of the actual tasks to be performed by the beneficiary in as well as evidence that [the petitioner has] the necessary facilities to employ the beneficiary on a full-time basis in "

In response, the petitioner submitted a letter dated December 21, 2012 from , its President, stating that the petitioner's business is providing consulting services to third parties either from the headquarters location or at the third parties' offices. further states that the petitioner did not intend the term "place of employment" on the labor certification to mean "worksite." The letter further said that the beneficiary has worked on various contracts in various locations, including , where the beneficiary was working at the time the letter was written. explains that the official place of the beneficiary's employment remains in regardless of the location where the beneficiary is doing the work. The petitioner further submitted pictures of its location in and the contract on which the beneficiary was working for the State of

The director's decision acknowledged the petitioner's assertion that work at the corporate headquarters would be available to an employee who was not otherwise assigned to a contract to work at a separate location. The director, however, cited the petitioner's failure to provide evidence to show that it would provide work for the beneficiary at its corporate headquarters on an ongoing basis. The director noted that the petitioner did not intend for the worksite to be the same as the place of employment, but additionally found that the labor certification has a specific entry to indicate the "primary worksite" for the proffered position and the petitioner listed only the New Jersey office. The director stated that the petitioner did not submit evidence that the proffered position actually involved work at the corporate headquarters.

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[1] The record also indicates that the director issued an RFE on July 20, 2011 and an earlier NOID on August 20, 2012.

The AAO's NOID/RFE cited the director's concerns and requested evidence demonstrating that the petitioner apprised potential U.S. workers that the proffered position involved work in multiple locations throughout the United States through its recruitment materials. In response, counsel reiterated its statement that the petitioner guaranteed work at its corporate headquarters and stated that the petitioner was unable to advertise for other work locations because the work would be done on a non-permanent contract basis in unknowable locales.

The recruitment materials submitted included advertisements placed in the August 15 and August 22, 2010 sections, the petitioner's internet advertisement, in-house posting, confirmation of the job order from the New Jersey Department of Labor, and a prevailing wage determination from DOL. The advertisements placed in the with the New Jersey Department of Labor, and in-house at the petitioner's office do not contain any indication that travel would be necessary or that the position would be located in a location other than the corporate headquarters. A July 22, 2013 letter from the petitioner's president accompanying the internet advertisement states that no hardcopy of the internet advertisement was retained, but that the language in the advertisement had not changed since 2010. That internet advertisement states that the position requires "travel/relocat[ion] to various unanticipated locations throughout the U.S . . . for long and short term assignments." This posting would be sufficient to apprise U.S. workers of the actual requirements of the position; however, the accompanying letter does not state that the advertisement was the actual advertisement run for the position, but that the advertisement had changed very little over the intervening three years.

The application for prevailing wage determination (PWD), however, belies any later statements by the petitioner that it did not state other worksites would be required because it did not know where those worksites would be located. The PWD contains a question in Part a, Block 7 that asks whether travel would be required in order to perform the job duties. The petitioner checked "no" to this question. Similarly in Part c, Block 7, the PWD asks whether work would be performed in multiple worksites within an area of intended employment or a location other than the address listed as the "place of employment." Again, the petitioner checked the "no" box. The labor certification, therefore, was written for a position requiring no travel or alternate assignments in various geographic locales as opposed to the position being offered to the beneficiary currently. The petitioner's representations on the PWD affected the DOL's analysis in determining the true prevailing wage for the position as well as the requirements of the position.

Counsel cites *Matter of Paradigm Infotech*, 2007-INA-00003 (BALCA 2007), for the premise that the proper place to file the labor certification application and conduct the recruitment is in the location of the petitioner's principal place of business, i.e. New Jersey. Counsel is correct that recruitment should have been, and was, conducted in New Jersey. The actual recruitment conducted, however, must apprise potential U.S. workers of the actual job requirements. BALCA held in *Siemens Water Technologies Corp.*, 2011-PER-00955 (BALCA 2013), that geographic location of employment must be listed in the advertisements to apprise U.S. workers as to the requirements of the position. In that case, the alien was given the option to work from his residence, which did not necessarily have to be in Houston (the location listed on the labor certification), and which greatly expanded the potential geographic location of employment. By listing the location as Houston,

Texas, potential U.S. applicants viewed the job location as less flexible than it actually was. BALCA also has held that travel requirements must be specifically listed on the labor certification and in recruitment materials. *See Riverwalk Educ. Found., Inc.*, 2012-PER-01281 (BALCA 2013) ("the Employer's ETA Form 9089 states: 'Occasional day travel to Corpus Christi, Texas from San Antonio, Texas, and back, may be required. No Overnights.' Despite this travel requirement listed on the ETA Form 9089, none of the Employer's recruitment materials, except for its Notice of Filing, mentioned any travel requirements. This is in violation of Section 656.17(f)(4), which requires employers to include in their advertisements any travel requirements listed on the ETA Form 9089."); *Keihin Fuel Sys., Inc.*, 2011-PER-02974 (BALCA 2013) ("Because the record shows that the Employer's NOF did not include the travel requirement listed on the ETA Form 9089, we affirm the denial of labor certification pursuant to 20 C.F.R. § 656.17(f)(4)"). Similar to these cases, potential U.S. workers may want the opportunity to travel or to work at locations other than the corporate headquarters. Conversely, such workers may not want to travel and would be misled by the terms of the recruitment advertising. As a result, the BALCA decisions support the conclusion that the job offer as expressed to potential U.S. applicants did not state the relevant conditions of employment.

As a result, the petition is not accompanied by a labor certification with a specific job offer valid for the area of intended employment. 8 U.S.C. § 204.5(l)(3)(i). The petition will remain denied on this basis.

Beyond the decision of the director, the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[2] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In response to the director's Notice of Intent to Deny on November 27, 2012, the petitioner submitted a list of its sponsored workers. That list contained the names of 37 workers, including the instant beneficiary, along with the priority date, proffered wage, and actual wage paid in 2011 with the corresponding IRS Forms W-2. The petitioner must establish that it has had the continuing

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[2] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record demonstrates a $478,035 difference in 2011 between actual wages paid and proffered wages to these 37 sponsored workers. The petitioner's 2011 IRS Form 1065 states a net income for that year of $109,023 and net current assets of $105,101. Thus, it has not established that it has the ability to pay the proffered wage to all the sponsored workers. The petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall,* 16 I&N Dec. at 142. *See also* 8 C.F.R. § 204.5(g)(2).

Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to its sponsored workers, net income and net current assets.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary and other sponsored workers from the priority date onwards.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.